

## Bulletin #21

The new *Strata Property Act* is overwhelming. Each month we attempt to inform and educate you on different provisions and we hope this process is helpful. If you need a copy of previous bulletins please feel free to ask your property manager. If you have joined your strata council in recent months you should obtain a copy of previous bulletins as they are most useful. The content of these bulletins does not purport to offer legal opinions or advice. You should retain and consult with legal professionals.

## ***Revenue Canada (CCRA) & Strata Corporations***

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Revenue Canada is now known as Canada Customs & Revenue Agency (CCRA).

We bring two issues to your attention in this bulletin. The first being the responsibility of a strata corporation to report to Revenue Canada and the second being the issue of responsibility of your strata corporation when it hires employees or contractors.

Believe it or not, even though your strata corporation is a non-profit organization, you are subject to the Income Tax Act as administered by CCRA. This means that, at your fiscal year-end you are supposed to file a tax return even though no income is derived and no tax is payable. In theory, if your strata corporation has never filed an income tax return in the past, chances are that CCRA will never know and it won't be an issue. The problem, however, is that it is a legal requirement and, sooner or later, if you do file a tax return, CCRA will ask for prior years' tax returns. Our advice to strata corporations, therefore, is to always file tax returns.

Still in the context of this first issue, note that strata corporations do have fixed year-ends. If your strata corporation changes its year-end, it is necessary to obtain the consent from CCRA. Year-ends of strata corporations are determined by a bylaw of the corporation and bylaws, as you well know, can be changed if you follow the correct process. What you must always remember, however, is that before changing the bylaw, you must first seek the consent of CCRA to change the year-end. In virtually all cases, CCRA will agree to the change if you can give good reasons. A typical good reason would be that the existing fiscal year-

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end is July 31<sup>st</sup> and it is virtually impossible to get owners out to the Annual General Meeting in July or August. Councils very often under these circumstances change their fiscal year-ends to either June 30<sup>th</sup> or September 30<sup>th</sup>. This is a reasonable request. There may be other reasons also that would be valid from CCRA's perspective.

The second issue that we bring to your attention in this bulletin has to do with the hiring of employees and/or contractors. Clearly, when a strata corporation hires an employee such as a resident caretaker or manager, that person is an employee in the strict legal sense of the word and proper deductions from their payroll are made for income tax, CPP and E.I. premiums. Many strata councils, however, engage persons to provide similar custodial functions but rather than set them up as employees, they call these persons "contractors" and pay them a flat amount without making deductions. Unfortunately, this does not always work to the strata corporation's benefit. There are many criteria (which we will not get into in this bulletin) that CCRA utilizes to determine whether or not a person is an employee or a contractor, but suffice it to say that merely calling a person a contractor (when, in fact, they should be an employee) does not avoid your liability.

We bring this point to your attention (as we have done previously) because of a recently received ruling from the appeal division of CCRA that an individual in a strata corporation who was paid \$400 per month in a very small building was deemed by CCRA to be an employee and not a contractor. CCRA has dinged the strata corporation approximately \$2,200 in back taxes and premiums. Penalties were not assessed in this instance, although it should be remembered that CCRA does have the power to assess penalties as well.

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As noted above, there are many criteria that need to be examined but, in short, if an individual is working at your building/property and that is essentially the only form of income they have, and they are following fixed schedules and duties, he or she is very likely to be deemed as an employee, not a contractor. Think of a contractor as a person who promotes his or her services to a broader community, meaning that that individual would have several contracts for services, not just the one at your particular strata corporation. It is that free entrepreneurial activity which makes a person a contractor, not an employee.

While most of the bulletins that we issue with our monthly financial statements tend to deal with matters arising from the new *Strata Property Act*, this one falls outside the statute but we felt it was important that you know about the recent decision which just landed on our desk.

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***"I'd like a copy of that engineering report . . ."***

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The leaky condo crisis of recent years has created a remarkable sensitivity to the condition of buildings as seen by future buyers and real estate agents. Whether a building is a leaky condo or not makes no difference: purchasers today are extremely wary of what they might be getting into. They cannot be blamed given all the negative publicity over the last five years.

Most strata councils are all too familiar with requests from purchasers (and real estate agents) for bylaws, financial statements and minutes of meetings. Today, however, prospective purchasers are requesting, not only that basic material, but also copies of engineering reports that may exist for a given building. So, here is a little test for you.

If your strata corporation has an engineering review on file, and a prospective purchaser asks for a copy, would you say that they are entitled to the report or not?

You probably know that, under the new *Strata Property Act*, there are statutory provisions requiring the strata corporation to release certain information. To help you answer the above quiz, take a look at sections 35 and 36 of the *Strata Property Act* and the Regulations.

**35 Strata corporation records**

- (1) The strata corporation must prepare all of the following records:
  - (a) minutes of annual and special general meetings and council meetings, including the results of any votes;
  - (b) a list of council members;
  - (c) a list of
    - (i) owners, with their strata lot addresses, mailing addresses if different, strata lot numbers as shown on the strata plan, parking stall numbers, if any, and unit entitlements,
    - (ii) names and addresses of mortgagees who have filed a Mortgagee's Request for Notification under section 60,
    - (iii) names of tenants, and
    - (iv) assignments of voting or other rights by landlords to tenants under sections 147 and 148;
  - (d) books of account showing money received and spent and the reason for the receipt or expenditure;
  - (e) any other records required by the regulations.
- (2) The strata corporation must retain copies of all of the following:

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- (a) the records referred to in subsection (1);
  - (b) the registered strata plan and any strata plan amendments as obtained from the land title office;
  - (c) this Act and the regulations;
  - (d) the bylaws and rules;
  - (e) resolutions that deal with changes to common property, including the designation of limited common property;
  - (f) waivers and consents under section 41, 44 or 45;
  - (g) written contracts to which the strata corporation is a party;
  - (h) any decision of an arbitrator or judge in a proceeding in which the strata corporation was a party, and any legal opinions obtained by the strata corporation;
  - (i) the budget and financial statement for the current year and for previous years;
  - (j) income tax returns, if any;
  - (k) correspondence sent or received by the strata corporation and council;
  - (l) bank statements, cancelled cheques and certificates of deposit;
  - (m) Information Certificates issued under section 59;
  - (n) the records and documents given to the strata corporation by the owner developer under section 20, or obtained by the strata corporation under section 23;
  - (o) any other records required by the regulations.
- (3) Records referred to in this section must be retained by the strata corporation for the periods set out in the regulations.

### **36 Access to records**

- (1) On receiving a request, the strata corporation must make the records and documents referred to in section 35 available for inspection by, and provide copies of them to,
- (a) an owner,
  - (b) a tenant who, under section 147 or 148, has been assigned a landlord's right to inspect and obtain copies of records and documents, or
  - (c) a person authorized in writing by an owner or tenant referred to in paragraph (a) or (b).
- (2) On receiving the request of a tenant, or a person authorized in writing by a tenant, the strata corporation must
- (a) make the bylaws and rules available for inspection, and
  - (b) provide copies of the bylaws and rules.
- (3) The strata corporation must comply with a request under subsection (1) or (2) within 2 weeks unless the request is in respect of bylaws or rules, in which case the strata corporation must comply with the request within one week.

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- (4) The strata corporation may charge a fee for a copy of a record or document provided under this section of not more than the amount set out in the regulations and may refuse to supply the copy until the fee is paid.

### Regulation 4.1 Preparation and retention of records

- (1) In addition to the records required to be prepared under section 35 (1) of the Act, the strata corporation must prepare a record of
  - (a) each council member's telephone number, or
  - (b) some other method by which the council member may be contacted at short notice, as long as that method is not prohibited by the bylaws.
- (2) The strata corporation must permanently retain the records and documents referred to in section 35 (2) (b), (e) and (h) of the Act.
- (3) The strata corporation must retain the records and documents referred to in section 35 (1) (a) and (d) and 35 (2) (f), (i), (j), (k), (l) and (m) of the Act for at least 6 years.
- (4) The strata corporation must retain the written contracts, including insurance policies, referred to in section 35 (2) (g) of the Act, for at least 6 years after the termination or expiration of the contract or policy.
- (5) The strata corporation must retain the correspondence referred to in section 35 (2) (k) of the Act for at least 2 years.
- (6) The strata corporation must retain current copies of the records and documents referred to in section 35 (1) (b) and (c) and 35 (2) (c) and (d) of the Act and subsection (1) of this section.
- (7) The strata corporation must retain the following records and documents referred to in section 35 (2) (n) of the Act and obtained from the owner developer under sections 20 and 23 of the Act for the following periods:
  - (a) the records and documents referred to in section 20 (2) (a) (i), (ii), (iv), (v) and (vi) of the Act must be permanently retained;
  - (b) the contracts, including insurance policies, referred to in section 20 (2) (a) (iii) of the Act must be retained for

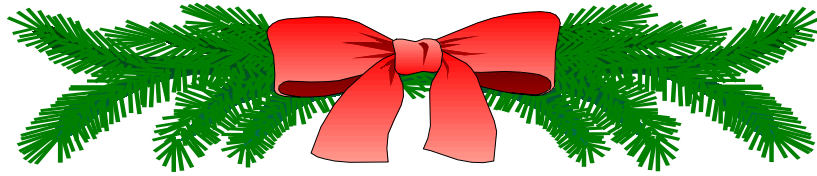
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at least 6 years after the termination or expiration of the contract or policy;

- (c) the records and documents, other than warranties, referred to in section 20 (2) (a) (vii) of the Act, must be retained until the disposal or replacement of the common property or common asset to which they relate;
- (d) the warranties referred to in section 20 (2) (a) (vii) of the Act must be retained until the disposal or replacement of the common property or common asset to which they relate, or the expiration of the warranty coverage, whichever comes first;
- (e) the financial records obtained under section 23 of the Act, if any, must be retained for at least 6 years after the transfer of control referred to in section 22 of the Act.

So what's the answer?

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## CHRISTMAS TREES

Many strata councils prohibit "live" Christmas trees in their buildings, citing fire safety concerns and/or problems associated with needles dropping in hallways (and not being cleaned up!). Can this be done?

If a bylaw to this effect has been created, the answer is probably "yes", although in one case we know of, the owner hauled the live tree up to his strata lot with a rope from his balcony. He told the council they had no authority to prohibit a live tree in his unit and he wished the council Merry Christmas (not). The strata council did not enforce its bylaw, reluctant to get into an ugly dispute at Christmastime and possibly have it legally challenged. Generally, however, there is support (ie. legal opinion) that a bylaw prohibiting live Christmas trees is enforceable.

Trouble is that most strata corporations do not have such bylaws. They usually have Rules which have been created by the strata council. Can a rule be created to this effect? The answer is "No".

The strata council certainly can make rules. The authority to do so is at Section 125 of the *Strata Property Act* which states:

- (1) The strata corporation may make rules governing the use, safety and condition of the common property and common assets.
- (2) A rule is not enforceable to the same extent that a bylaw is not enforceable under section 121 (1).

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- (3) All rules, including those posted on signs, must be set out in a written document that is capable of being photocopied.
- (4) The strata corporation must inform owners and tenants of any new rules as soon as feasible.
- (5) If a rule conflicts with a bylaw of the strata corporation, the bylaw prevails.
- (6) A rule ceases to have effect at the first annual general meeting held after it is made, unless the rule is ratified by a resolution passed by a majority vote
  - (a) at that annual general meeting, or
  - (b) at a special general meeting held before that annual general meeting.
- (7) Once a rule has been ratified under subsection (6), it is effective until it is repealed, replaced or altered, without the need for further ratification.

The key element is in subsection (1). Note that rules govern common property and common assets. Individual strata lots are not common property – they are private property. A rule, therefore, cannot be applied in the case of the Christmas tree issue. It is true that an owner transporting a live Christmas tree from the front door of the building to his/her strata lot is using common property and council could conceivably take a hard line and declare that the rule does apply in that area. Would the owner take the position that council has no right to regulate (ie. rule) what personal property an owner can or cannot carry to a strata lot? Luckily, the vast majority of owners/occupants will respect council's wishes in this matter but you can be sure that one day this matter will "come to blows" in arbitration or litigation.

Bottom line: if you want to prohibit live Christmas trees, you would do well to create a bylaw. If there is not sufficient time and/or opportunity to do it for this Christmas and you want to rely on a rule, go ahead but just be aware of the problem.

Merry Christmas!